**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2014 MSPB 12**

Docket No. DC-1221-12-0321-M-1

**Matthew J. Nasuti,**

**Appellant,**

**v.**

**Department of State,**

**Agency.**

February 27, 2014

Matthew J. Nasuti, Deerfield, Massachusetts, pro se.

Anne Joyce, Esquire, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins did not participate in the adjudication of this appeal.

## OPINION AND ORDER

¶1 This case is before the Board on remand from the U.S. Court of Appeals for the Federal Circuit to address the appellant's contention that his employment was terminated because he made a protected whistleblowing disclosure alleging that substandard and inadequate body armor was being supplied to State Department employees en route to Iraq. Specifically, the court has asked the Board to decide whether section 101 of the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, § 101, 126 Stat. 1465, 1466 (2012), applies retroactively and, if so, whether the appellant has alleged a protected disclosure

under the new statute. As discussed below, we answer both of those questions in the affirmative, and REMAND the case to the regional office for adjudication on the merits.

## BACKGROUND

¶2 This case has a complicated procedural history involving numerous legal claims and theories of recovery. The Federal Circuit's most recent decision, 504 F. App'x 894 (Fed. Cir. 2013) (Nos. 2012-3136 & 2012-3162), resolved all matters but for the one identified above. The appellant alleged that, in March 2008, he "'raised objections to multiple officials in the ITAO [State Department's Iraq Transition Assistance Office], including assistants to [the] ITAO Personnel Director . . . that the body armor being supplied . . . to State Department employees en route to Iraq . . . was substandard and inadequate.'" *Id.* at 898. The court reversed the Board's rulings that the appellant had failed to exhaust his Office of Special Counsel (OSC) remedy as to this claim, that the claim was precluded under the doctrine of collateral estoppel, and that the appellant failed to adequately allege a "substantial and specific danger to public health or safety." *Id.* at 898-99. Regarding the Board's apparent conclusion that the appellant's disclosures were inadequate because they were made to persons without authority to address the problem, the court noted that section 101 of the WPEA broadened the scope of protected disclosures under the Whistleblower Protection Act (WPA), and stated that "the Board should decide in the first instance whether the new statute applies retroactively and whether, if so, Nasuti has alleged a protected disclosure under the new statute." *Id.* at 899.

## ANALYSIS

¶3 The relevant portion of section 101 of the WPEA, which has been codified at 5 U.S.C. § 2302(f), provides that a disclosure shall not be excluded from the coverage of the WPEA because it was made to a supervisor or to a person who participated in an activity that the discloser reasonably believed evidenced any

violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(f)(1)(A); Pub. L. No. 112-199, § 101, 126 Stat. 1465, 1466 (2012); *see* 5 U.S.C. § 2302(b)(8)(A). The statute also provides that a disclosure is protected under the WPEA regardless of the individual's motives for making the disclosure, even if the disclosure revealed information that had been previously disclosed, was not made in writing, was made while the employee was off duty, and regardless of the amount of time which has passed since the occurrence of events described in the disclosure. 5 U.S.C. § 2302(f)(1)((B) – (F); Pub. L. No. 112-199, § 101, 126 Stat. 1465, 1466 (2012). Finally, section 101 of the WPEA cited by the court in its decision, addresses disclosures made in the normal course of an employee's duties. 5 U.S.C. § 2302(f)(2); Pub. L. No. 112-199, § 101, 126 Stat. 1465, 1466 (2012).

¶4 Although section 101, as discussed above, does not specifically address whether a disclosure lacks protection unless it is made to a person with authority to address the problem, the legislative history makes clear that section 101 of the WPEA was intended to reverse any decisions so holding. The Senate Report to the WPEA states as follows:

> Section 101 of S. 743 overturns several court decisions that narrowed the scope of protected disclosures. For example, in *Horton v. Department of the Navy* [66 F.3d 279 (Fed. Cir. 1995)], the court ruled that disclosures to the alleged wrongdoer are not protected, because the disclosures are not made to persons in a position to remedy the wrongdoing. . . .
>
> These holdings are contrary to congressional intent for the WPA. The court wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA. . . .

S. Rep. No. 112-155, at 5 (2012).

¶5 The Board has held that it will apply section 101 of the WPEA to cases pending before the Board when the WPEA was enacted. *See Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ¶ 14 (2013); *Day v. Department of*

*Homeland Security*, 119 M.S.P.R. 589, ¶ 26 (2013). Accordingly, we conclude that section 101 of the WPEA applies to this case, and that, under section 101, there is no requirement that the employee make a disclosure to a person who is in a position to remedy the matter disclosed.

¶6 Even without the enactment of the WPEA, we note that, contrary to the Senate Report cited above, neither the Federal Circuit, nor the Board, had recently interpreted the WPA to preclude protection for a disclosure unless it was made to a person with actual authority to remedy the wrongdoing. In *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1351 (Fed. Cir. 2001), the court stated that "*Willis* [*v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998)] and *Horton* [*v. Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995)] do not require that the reports must be made to a person with actual authority to correct the wrong." "No requirement of actual authority is found in the language of the statute, and we think it is quite clear that reports do not need to be made to those with authority to correct the alleged wrongdoing in order to be protected by the WPA." *Id.* The Board has similarly ruled that complaints to supervisors concerning wrongdoing by other employees, or other matters within the scope of the WPA, may constitute "protected disclosures," even if the supervisor lacks authority to directly correct the wrongdoing, provided that the disclosure meets the other requirements of the statute. *Dilorenzo v. Department of Veterans Affairs*, 103 M.S.P.R. 506, ¶ 8 (2006). Whether the appellant's supervisor lacked authority to correct the alleged wrongdoing, or condoned it, does not preclude the appellant's disclosure from WPA protection. *Id.*, ¶ 9. Accordingly, we conclude that the WPA, even prior to the enactment of section 101 of the WPEA, did not preclude the appellant's disclosure regarding alleged substandard and inadequate body armor from being protected.

¶7 The court has already ruled that the appellant exhausted his OSC administrative remedy concerning the alleged disclosure, and that the disclosure constituted a nonfrivolous allegation of a substantial and specific danger to public

health or safety. 504 F. App'x at 898-99. The final jurisdictional issue is whether the appellant made a nonfrivolous allegation that his disclosure was a contributing factor in the agency's decision to terminate his employment. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). An employee may demonstrate that a disclosure was a contributing factor in a covered personnel action through circumstantial evidence, such as the acting official's knowledge of the disclosure and the timing of the personnel action. *Hugenberg v. Department of Commerce*, 120 M.S.P.R. 381, ¶ 12 (2013); *see* 5 U.S.C. § 1221(e)(1). An appellant may also show that a protected disclosure was a contributing factor by proving that the official taking the action had constructive knowledge of the protected disclosure, even if the official lacked actual knowledge. *Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 11 (2012). One way of establishing constructive knowledge is by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action. *Id.* In an individual right of action (IRA) appeal, the party before the Board is the agency, not its individual officials, and lack of knowledge by a particular official is not dispositive. *Id.*, ¶ 12.

¶8 The appellant's employment was terminated effective March 28, 2008, by the ITAO Personnel Director. MSPB Docket No. DC-1221-09-0356-W-1, Initial Appeal File (IAF), Tab 1 at 30, 37. The appellant alleged that he made his disclosures regarding inadequate or substandard body armor on March 16 and 17, 2008. He alleged that he made his disclosures to his Iraq Orientation Class at the Foreign Service Institute, which included one Senior Diplomat and a number of foreign service officers and middle managers who had orders for Iraq, and that he also made these disclosures to another individual in the ITAO, and "to others within the ITAO, Office of Legal Counsel and [Department of State] Inspector General." MSPB Docket No. DC-1221-12-0321-W-1, IAF, Tab 1 at 21-22.

¶9 Although we do not see definitive evidence in the record showing that the ITAO Personnel Director had actual knowledge of the appellant's disclosures regarding inadequate or substandard body armor being furnished to employees en route to Iraq, we also see no affirmative statement by her that she was not aware of these disclosures. The court also noted that the appellant specifically alleged that he disclosed to multiple officials in the ITAO, including the ITAO Personnel Director, that the armor was substandard. Given the apparent widespread dissemination of the disclosures, we conclude that the appellant nonfrivolously alleged that the agency was aware of his disclosure when it made the decision to terminate his employment, and that his disclosure was a contributing factor in that decision. Jurisdiction having been established over the appellant's IRA appeal, it must be remanded to the regional office for adjudication on the merits.[*]

## ORDER

¶10 This case is remanded to the Washington Regional Office for adjudication of the appellant's claim that his employment was terminated in retaliation for disclosing inadequate body armor being supplied to State Department employees

[*] Following the court's remand, the appellant filed pleadings with the Board seeking discovery and a hearing in his appeal. Court Remand File, Tabs 3-4. This decision remands this matter to the administrative judge and allows for discovery and a hearing as sought by the appellant. In other pleadings, the appellant complains about the purported mistreatment of whistleblowers in general and corruption in government programs. *Id.*, Tabs 4-6. These claims are outside the purview of the Board's authority to address claims of reprisal for whistleblowing in the specific case before it. 5 U.S.C. §§ 1221(a) and 2302(b)(8).

en route to Iraq. The parties will be allowed an opportunity to conduct discovery prior to a hearing in the case.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
WASHINGTON, D.C.